STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN BEENE,

Defendant-Appellant.

UNPUBLISHED
July 15, 2010

No. 289862
Kent County Circuit Court
LC No. 08-003473-FH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Defendant David Allen Beene pleaded guilty to one count of driving while license suspended, second offense, MCL 257.904(3)(a). Following a jury trial, he was convicted of one count of conspiracy to commit uttering and publishing, MCL 750.249; 750.157a. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 4 to 30 years' imprisonment on the conspiracy conviction and to 59 days' time served on the suspended license conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Roy Rolando Ervin III attempted to pass a fraudulent check at the Meijer Grandville store. Ervin testified against defendant pursuant to a plea arrangement. He explained that he was a homeless crack cocaine addict and that defendant had given him $40 in exchange for use of his identification card to cash bad checks. Ervin claimed that he agreed to cash a check in return for half the money. Defendant drove Ervin to the Jenison Meijer store, where Ervin attempted to cash the check. When that was unsuccessful, defendant drove him to the Grandville Meijer. The store detective at the Grandville store had been alerted and observed defendant follow Ervin into the store. Ervin went to the service area and presented the check. Defendant was pacing back and forth behind the checkout lanes, talking on his cellular telephone and watching Ervin. Defendant left the store as the store detective was calling the police. The police stopped defendant's truck. Defendant was arrested for not having a license and was given *Miranda*[1] warnings. He answered the officer's questions, but then said that he wanted a lawyer.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

At trial, defendant testified that Ervin offered him $40 to drive him around, and that he went into the Grandville store to get some medicine for his daughters. He denied involvement in the check-cashing scheme.

During cross-examination of defendant, the following exchange ensued:

> Q. In fact, there's a tremendous amount of new information we're getting into today in court versus what you told the police, correct?
>
> A. I didn't talk—
>
> [Defense counsel]: Objection. That's argumentative, your honor.
>
> THE COURT: I—I agree. Rephrase the question.
>
> [By the prosecutor]:
>
> Q. You've gone into a lot of detail in court today that was not mentioned to the two officers you dealt with that night, correct?
>
> A. That is correct.
>
> Q. Okay. So you left a lot out on the scene there?

This questioning ceased after defense counsel called for a sidebar. Subsequently, counsel explained that she thought the questions were getting awfully close to the fact that defendant, at the time of his arrest, had invoked his right to remain silent. Counsel declined a cautionary instruction, believing that it would just call attention to the issue.

Defendant argues that the prosecutor's questions violated his constitutional right to remain silent. We disagree. Defendant seems to be invoking the rule of *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), in which the Court held that a prosecutor could not impeach an exculpatory story by cross-examining the defendant about the failure to have told it after receiving *Miranda* warnings at the time of arrest. *Id*. at 611. This rule bars references to a defendant's post-arrest, post-*Miranda* silence. *Id.* However, defendant initially answered the officer's questions after he was arrested and had been given *Miranda* warnings. The prosecutor's questions did not reference defendant's *silence*. In *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999), this Court stated:

> Where a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial.

Once defendant offered an exculpatory story, the prosecutor could inquire about his failure to offer exculpatory statements during the period that he was actually talking to the police.

Even if the prosecutor's questions crossed a line, *People v Shafier*, 483 Mich 205, 214-215; 768 NW2d 305 (2009), indicates that where there is an immediate objection concerning

post-arrest, post-*Miranda* silence and a curative instruction, there is no violation of *Doyle*. Here, the objection to the questions was immediate and a curative instruction was offered. Given that the questions were isolated and that defense counsel did not see the need for a curative instruction, we conclude that there was no *Doyle* violation.

Defendant next argues that the prosecutor impermissibly referenced other criminal acts during closing argument in an attempt to smear his character. The prosecutor indicated that defendant regularly passed counterfeit checks. Ervin testified that defendant had previously asked to use his identification card to pass checks and averred that he had witnessed defendant working with someone else to do so earlier in the day. Prosecutors are free to argue the evidence and all reasonable inferences that arise from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant has failed to establish prosecutorial misconduct, let alone a plain error.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens